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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

\* \* \*

CAROL LUCARELLI, special administratrix of  
the estate of ROBERT W. WELLS, deceased,  
individually and on behalf of all similarly  
situated; JANE WELLS, surviving spouse and  
heir of ROBERT W. WELLS, deceased,

Plaintiffs,

vs.

DVA RENAL HEALTHCARE, INC.; DOES 1  
through 50, inclusive; ROE CORPORATIONS  
1 through 50, inclusive,

Defendants.

Case No.: 2:07-cv-1217-RLH-GWF

**ORDER**

(Motion to Dismiss—#4; Motion to  
Stay—#7; Motion to Remand—#8; Motion to  
Transfer—#27; Motion for Leave to File  
Supplement—#33)

Before the Court is Defendant DVA Renal Healthcare, Inc.'s ("DVA") **Motion to Dismiss** (#4), filed September 14, 2007. The Court has also considered Plaintiffs Carol Lucarelli, special administratrix of the estate of Robert W. Wells, deceased, and the above-named surviving heirs' Opposition (#6), filed October 2, 2007, and Defendant's Reply (#11), filed October 16, 2007.

Also before the Court is Plaintiffs' **Motion to Stay** (#7), filed October 2, 2007. The Court has also considered Defendant's Response (#12), filed October 17, 2007.

Also before the Court is Plaintiffs' **Motion to Remand** (#8), filed October 8, 2007. The Court has also considered Defendant's Opposition (#15), filed October 23, 2007, and Plaintiffs' Reply (#21), filed November 6, 2007.

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2 Also before the Court is Defendant's **Motion to Transfer** (#27), filed December 3,  
3 2007. The Court has also considered Plaintiffs' Opposition (#31), filed December 21, 2007, and  
4 Defendant's Reply (#32), filed December 21, 2007.

5 Also before the Court is Plaintiffs' **Motion for Leave to File Supplement to**  
6 **Motion to Remand** (#33), filed January 8, 2008.

### 7 BACKGROUND

8 This case is one of at least thirty-two lawsuits filed by separate plaintiffs in Nevada  
9 state court based on allegations of Defendant's negligent operation of hemodialysis treatment  
10 facilities. Defendant removed at least fifteen of these lawsuits to the United States District Court  
11 for the District of Nevada on the basis of diversity of citizenship. Of the thirty-two lawsuits, only  
12 two plaintiffs actually received treatment in Nevada. In the instant case, Plaintiffs are Mississippi  
13 citizens and the decedent, Mr. Wells, received his dialysis treatments in Tennessee. Defendant is  
14 a Tennessee corporation with its principal place of business in California.

15 Plaintiffs filed this class-action lawsuit in Nevada state court in February 2005.  
16 The Complaint named Gambro Healthcare Renal Care, Inc. ("Gambro"), Defendant's sibling  
17 corporation, as the sole defendant. Shortly thereafter, the Parties agreed to hold this action in  
18 abeyance indefinitely and no other class members were subsequently identified. The abeyance  
19 remained in effect until December 2006, when the Parties agreed to consolidate the case for  
20 certain limited purposes. The Parties agreed to address first, in the consolidated case, the issue of  
21 whether Plaintiffs had sued the proper defendant. In March 2007, the Parties stipulated to a  
22 voluntary dismissal of Gambro in the suits in which it was incorrectly named, including this case.  
23 As part of the stipulation, Defendant agreed not to oppose Plaintiffs' request to amend and also to  
24 provide Plaintiffs' counsel with the correct corporate entity in all future hemodialysis-related  
25 cases. Plaintiffs filed their Amended Complaint in April 2007 and after receiving service,  
26 Defendant—on the basis of diversity—timely removed to this Court.

## DISCUSSION

### I. Motion to Remand

Plaintiffs move the Court for an order remanding this case to the Eighth Judicial District Court for the State of Nevada. 28 U.S.C. § 1441 permits a defendant to remove a state court action if the federal district court has original jurisdiction. A defendant invoking the removal statute bears the burden of establishing jurisdiction, and the statute is strictly construed against removal. *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004). Consequently, “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). But while a federal court “will not take jurisdiction if it should not . . . it is equally true, that it must take jurisdiction if it should.” *Cohens v. Virginia*, 19 U.S. (1 Wheat) 264, 404 (1821). Thus, a district court with proper jurisdiction lacks discretion to remand. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 356 (1988).

Defendant removed this case from Nevada state court based on diversity of citizenship. *See* 28 U.S.C. § 1332(a). Plaintiffs do not dispute this Court’s jurisdiction or the procedural validity of removal; rather, they argue that Defendant waived the right to remove this case because of its state court actions in other lawsuits.

“A party, generally the defendant, may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes actions in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum.” *Resolution Trust Co. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994). “A waiver of the right to removal must be clear and unequivocal.” *Id.* (citations and internal quotations omitted). “In general, the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits.” *Id.* (citations and internal quotations omitted).

The Court begins by noting that waiver is an exception to its duty “to adjudicate a controversy properly before it.” *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188

1 (1959). Waiver in this case must be based on Defendant's affirmative conduct in the state court in  
2 this case. The record establishes that Plaintiffs filed this case in state court in February 2005, and  
3 that it was held in abeyance until the end of 2006. In state court, the Parties stipulated to  
4 consolidate this action with the other Gambro cases for the purposes of discovery and to hear  
5 Defendant's motion to dismiss. Moreover, the Parties stipulated to resolve first whether the  
6 Complaint named the proper defendant. In March 2007, the Parties stipulated to dismiss the suit  
7 against Gambro and amend the Complaint to name DVA as the proper defendant. Once served,  
8 Defendant timely removed this case to federal court on the basis of diversity because Defendant is  
9 a Tennessee corporation and Plaintiffs are citizens of Mississippi. Plaintiffs submit no evidence  
10 that Defendant took other actions in the state court to adjudicate the merits of this suit. Instead,  
11 Plaintiffs contend that Defendant's state court conduct in the other consolidated cases constitutes  
12 waiver. Moreover, Plaintiffs argue that considerations of efficiency and judicial economy justify  
13 remand because this case would be part of the consolidated action if it were to remain in state  
14 court.

15           The Court finds the state court consolidation unpersuasive in its determination of  
16 whether Defendant properly removed this case to federal court, and Defendant's conduct in the  
17 other cases cannot waive its right to remove in this case. The Court recognizes that allowing this  
18 case to proceed as part of the state court consolidation might promote efficiency and a  
19 conservation of judicial resources,<sup>1</sup> but those considerations are secondary to the Court's duty to  
20 exercise its jurisdiction and Defendant's right to proceed in a federal forum. Moreover, efficiency  
21 considerations alone cannot justify remand. *See Thermatron Prods., Inc. v. Hermansdorfer*, 423  
22 U.S. 336, 351 (1976) ("That justice may move more slowly in some federal courts than in their

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24           <sup>1</sup> The Court notes, however, that while the consolidated cases involve similar tort  
25 claims against related defendants, proceeding in a common forum would not necessarily be  
26 more efficient. The evidence and witnesses are located in several different states, and at  
minimum, each plaintiff will need to uniquely prove causation and his or her damages.  
Causation and damages are significant issues given that each plaintiff was already seriously  
ill before receiving dialysis treatments in Defendant's clinics.

1 state counterparts is not one of the considerations that Congress has permitted the district courts to  
 2 recognize in passing on remand issues.”), *abrogated on other grounds by Quackenbush v. Allstate*  
 3 *Ins. Co.*, 517 U.S. 706, 714–15 (1996).

4 Accordingly, Plaintiffs’ Motion to Remand is denied.

## 5 **II. Motion to Transfer**

6 Defendant moves the Court to transfer this case to the Western District of  
 7 Tennessee pursuant to 28 U.S.C. § 1404(a). Section 1404(a) permits a district court to transfer  
 8 any civil action to any other district or division where the action might have been brought for the  
 9 convenience of the parties and witnesses and in the interests of justice. “To support a motion for  
 10 transfer, the moving party must show: (1) that venue is proper in the transferor district; (2) that the  
 11 transferee district is one where the action might have been brought; and (3) that the transfer will  
 12 serve the convenience of the parties and witnesses and will promote the interest of justice.”  
 13 *Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp.*, 820 F. Supp. 503, 506 (C.D. Cal.  
 14 1992).

### 15 **A. Venue in the District of Nevada**

16 Defendant removed this action to this Court pursuant to 28 U.S.C. § 1441(a), which  
 17 provides: “any civil action brought in a State court of which the district courts of the United States  
 18 have original jurisdiction, may be removed . . . to the district court of the United States for the  
 19 district and division embracing the place where such action is pending.” Here, Plaintiffs filed this  
 20 case in Clark County; this Court embraces Clark County and is therefore the proper venue for  
 21 removal. *See Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953).

### 22 **B. Propriety of Action in the Western District of Tennessee**

23 “In determining whether an action might have been brought in a district, the court  
 24 looks to whether the action initially could have been commenced in that district.” *Hatch v.*  
 25 *Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). Plaintiffs could have commenced this action  
 26 in the Western District of Tennessee if that court would have had subject matter jurisdiction over

1 the claims and personal jurisdiction over the Parties. Pursuant to 28 U.S.C. § 1332, Plaintiffs  
 2 could have brought this action in the Western District of Tennessee under diversity jurisdiction  
 3 because the Parties are diverse and the amount in controversy exceeds \$75,000. Mr. Wells was a  
 4 Mississippi citizen at the time of his death, and thus Carol Lucarelli, special administratrix of Mr.  
 5 Wells' estate, is deemed a citizen of Mississippi. *See* 28 U.S.C. § 1332(c). Moreover, Defendant  
 6 asserts that the surviving heirs of Mr. Wells' estate are also Mississippi citizens, and Plaintiff does  
 7 not contest that assertion. Defendant is incorporated in Tennessee and maintains its principal  
 8 place of business in California. Accordingly, the Parties are diverse as required by § 1332. Also,  
 9 Defendants have shown that Plaintiffs seek damages for loss of support, companionship, society,  
 10 consortium, and pain and suffering caused by Mr. Wells' death, as well as special damages for  
 11 medical care, treatment, burial and funeral expenses, and punitive damages, which exceed the  
 12 \$75,000 threshold. Therefore, the Western District of Tennessee would have original jurisdiction  
 13 over this action. In addition, the Western District of Tennessee has in personam jurisdiction over  
 14 Defendant because it is a Tennessee corporation. *See Milliken v. Meyer*, 311 U.S. 457, 462  
 15 (1940). Consequently, Plaintiff could have brought this action originally in the Western District  
 16 of Tennessee because the Tennessee federal court would have original jurisdiction over the claims  
 17 and personal jurisdiction over the Parties.

### 18 **C. Convenience of the Parties and the Interests of Justice**

19 In considering the convenience of the parties and witnesses and the interests of  
 20 justice, courts evaluate: (1) the location where the alleged harm occurred, (2) the state that is most  
 21 familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties'  
 22 contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen  
 23 forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of  
 24 compulsory process to compel attendance of unwilling non-party witnesses, (8) the ease of access  
 25 to the evidence, and (9) the relevant public policy of the forum state. *Jones v. GNC Franchising,*  
 26 *Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000).

Here, the convenience of the Parties and witnesses and the interests of justice favor transferring this case to the Western District of Tennessee. Mr. Wells received treatments in Memphis, Tennessee at Defendant's hemodialysis facility. The evidence and witnesses of his treatments, including the doctors and nurses who treated him, are all located in Tennessee. As such, compulsory process would be unavailable to secure their attendance in Nevada. Moreover, the costs of litigation would be substantially greater because the attorneys and witnesses would be forced to travel for discovery and trial. Tennessee also has the most significant relationship to this case, and consequently, Tennessee tort law applies. *See Gen. Motors Corp. v. Eighth Judicial Dist. Court*, 134 P.3d 111, 116 (Nev. 2006). Thus, a federal court in Tennessee would be more familiar with the law of this case. In addition, while Plaintiffs chose to file this suit in Nevada, the "operative facts" of the case did not occur in Nevada, and so Plaintiffs' preference "is entitled to only minimal consideration." *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). Finally, the Court is unaware of any Nevada public policy that favors retaining a Nevada venue when the only connection with the state is Plaintiffs' counsel.

In sum, the Court finds that removal venue is proper in the District of Nevada, that this action could have originally been brought in the Western District of Tennessee, and that the convenience of the Parties and witnesses and the interests of justice favor transferring this case. Accordingly, the Court grants Defendant's Motion to Transfer.

### **III. Motion to Stay, Motion to Dismiss, and Motion for Leave to File Supplement**

Because the Court grants Defendant's Motion to Transfer, all remaining motions are denied as moot.

### **CONCLUSION**

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#4) is DENIED as moot.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Remand (#8) is DENIED.

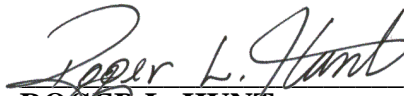
1 IT IS FURTHER ORDERED that Defendant's Motion to Stay (#7) is DENIED as  
2 moot.

3 IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File Supplement  
4 (#33) is DENIED as moot.

5 IT IS FURTHER ORDERED that Defendant's Motion to Transfer (#27) is  
6 GRANTED.

7 The Court orders the case transferred to the Western District of Tennessee.

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9 Dated: January 14, 2008.

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12 **ROGER L. HUNT**  
13 **Chief United States District Judge**  
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